LITIGATION PRIMER

International Municipal Lawyers Association
69th Annual Conference
San Antonio, Texas
Institute for New Local Government Attorneys
October 3, 2004

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By Marvin J. Glink and Thomas G. DiCianni
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Chicago, Illinois

I. WHO IS YOUR CLIENT?

A. Individuals
B. Corporate Authorities
C. Has Service of Summons Been Properly Had?

II. WHAT KIND OF CASE IS INVOLVED?

A. Ordinance Defense
B. Land Use Issue
C. Personal Injury
D. Federal Statute Violation
E. Monetary or Equitable Claim

III. IS THERE INSURANCE OR SOME RISK MANAGEMENT POOL WHO SHOULD DEFEND CASE?

A. Direct Defense Under Current Policy
B. Indirect Beneficiary of Insurance or Covenant to Hold Harmless

IV. IS THERE ANY POTENTIAL CONFLICT OF INTEREST IN DEFENDING CASE OR ANY POTENTIAL ETHICAL PROBLEMS?

V. DOCKET, SET UP DATES, DIARY, DIARY AND DIARY

A. Are You Licensed to Practice in the Jurisdiction Involved? Is Your Opponent?
B. Executive Session With the Corporate Authorities
C. Has the City/County Authorized You to Defend the Case by Ordinance or Resolution?

VI. FIRST IMPORTANT STEPS

A. Do You Have Any Statutory or Constitutional Defenses?

B. Determine All The Relevant Facts
C. Personally Interview All The Witnesses Involved
D. Visit to Scene
E. Anticipate What Discovery You Will Need to Defend
F. Start the Preparation of a Working Trial Brief

1. The facts
2. Witnesses
3. The law supporting and in opposition

G. What Judge Is The Case Assigned To and Do You Need to Consider a Possible Change of Venue - Jury or Non-Jury. (See February 2002, ABA Journal, p. 33)
H. Will You Need to Hire Experts? Are There Funds Available in the Budget or Should You Get Specific Approval?
I. Special Preparation for Federal Litigation.

1. §1983 actions
2. Ordinance enforcement
3. Acts of officers and employees (See July/August, 2002 IMLA Municipal Lawyer, p. 7 -*Deadly Force Cases*)
4. Sex discrimination, Americans With Disabilities cases, Takings cases, First Amendment cases.
5. Motion to strike, dismiss or for summary judgment.

VII. DO WE LITIGATE OR SETTLE?

VIII. PRE-TRIAL HEARINGS

Know the Rules, Including Local Requirements

IX. PREPARING FOR TRIAL

A. Discovery and Depositions, Interrogatories or Request to Admit Facts
B. Trial Brief, Know Your Case. Preparation and More Preparation. (See ABA Journal, August, 2002, p. 54).
C. Motions Prior to Trial
D. Organizing Evidence, Preparing Witnesses for Direct and Cross-Examination
E. Opening Statement (See March, 2002, ABA Journal, p. 60)
F. Summations
G. Jury Instructions

X. KNOW THE RULES OF EVIDENCE, PRESERVE YOUR RECORD

XI. SPECIAL LITIGATION ISSUES

A. Peremptory Challenges

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986);
United States v. Carter, 111 F.3d 509 (7th Cir. 1997)

B. Expert Witnesses

Daubert v. Merrel-Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993). Expert testimony must be reliable and relevant to be admissible, and the trial judge must act as the gatekeeper in excluding unreliable and irrelevant testimony.

General Electric Co., v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997). Trial judge cannot abdicate its gatekeeper function.

Kumho Tire Co., v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999). Daubert principles apply to all experts, not just scientific testimony.

C. Punitive Damages

Punitive damages raise federal constitutional issues - Pacific Mutual Life Ins. Corp., v. Haslip, 499 U.S. 1, 111 S.Ct., 1032 (1991);

TXO Products Corp., v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993);

BMW of North America v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996).

D. Ways to Attack Punitive Damages

1. Motion in Limine
2. Net Worth Evidence
3. Directed Verdict
4. Favorable Jury Instructions
5. Post-Trial Attacks

XII. POST TRIAL ACTIVITY

A. Entry of Judgment Order
B. Always Poll Jury
C. Motions for New Trial, Judgment N.O.V., Stay Judgment, If Necessary
D. Watch Out for Rule 59 of Federal Rules of Civil Procedure

XIII. APPEALS

XIV. IMPORTANT RECENT CASES THAT MAY AFFECT TRIAL STRATEGY IN SPECIFIC CASES.

Americans With Disabilities Act

Toyota Motors Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). Workers must show disability in everyday tasks, toothbrush test -impairment must be permanent or long term. (March 2002, ABA Journal, pp. 34, 35)

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). EEOC may sue on behalf of discrimination victims despite any private arbitration agreement.

Barnes v. Gorman, 122 S.Ct. 2097 (2002). Disabled arrestee, transported in a police van in a wheel chair, was not entitled to punitive damages under Title II of the ADA. Also, punitive damages are not awarded in private suits under Title VI of the Civil Rights Act.

Towing Regulations

City of Columbus v. Ours Garage and Wrecker Service, Inc., 122 S.Ct. 2226 (2002). State can delegate to municipality authority to establish safety regulations, notwithstanding general federal preemption.

Warrantless Searches

U.S. v. Knights, 534 U.S. 112 (2001). Police officers do not need a warrant when there is a reasonable suspicion a probationer has committed a crime. The probation order subjected the offender to personal and property searches. No Fourth Amendment violation. (See ABA Journal, Feb. 2002, p. 307; IMLA Memo, Dec. 10, 2001.)

Ordinances/First Amendment

Thomas v. Chicago Park District, 534 U.S. 316 (2002). Ordinance requiring permit before conducting large scale events not facially unconstitutional, was proper content-neutral, time, place and manner restriction with prompt judicial review.

Drug Testing

Board of Educ. of Independent Sch. Dist. # 92 of Pottawatomie County v. Earls, 122 S.Ct. 2559 (2002). School policy requiring all students participating in extra-curricular activities to submit to drug testing was upheld as a reasonable means of deterring drug use among students.

Solid Waste Flow Control

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth., 261 F.3d 245 (2d Cir. 2001). Court limited effect of Carbone to privately-owned waste management facilities. Will Supreme Court agree? (Nov./Dec. IMLA Municipal Lawyer, 2001, p. 12).

Public Employment

Stone v. City of Indianapolis Public Utilities Div., 281 F.3d 640 (7th Cir. 2002). Proper summary judgment standards when plaintiff claims retaliation for complaints about employment discrimination clarified by 7th Circuit.

Delago v. Jones, 282 F.3d 511 (7th Cir. 2002). Police detective stated valid First Amendment retaliation claim against police chief and deputy chief, where detective alleged he was punished because he investigated alleged criminal activities of elected official's close relative and close friend of the police chief.

Sign Ordinance

Edwards v. City of Coeur d'Alene, 262 F.3d 856 (9th Cir. 2001). Ordinance prohibiting picketing signs with wooden, plastic or other handles violates First Amendment. (IMLA Municipal Lawyer, Nov./Dec. 2001, p. 31)

Ordinance /Building Codes

Cruz v. Town of Cicero, 275 F.3d 579 (7th Cir. 2001). Condominium conversion owner's Fourteenth Amendment equal protection claim against town for not furnishing certificates of completion was held motivated by totally illegitimate animus. The Town President allegedly applied unprecedented and questionable standards after one of the owners did not repay her with a significant contribution.

Home Rule/Gun Control Ordinances

City of Chicago v. Taylor, 774 N.E.2d 22 (1st Dist. 2002). City was entitled to confiscate and destroy a firearm that was owned by a non-resident and was not registered with the City. The ordinance was constitutional and not preempted by state regulation.

Law Office Set Up and Management

Susie Mimura

This presentation is designed to assist the new IMLA member or newly appointed City Attorney in assessing a law office's needs and in implementing changes. While some of my comments are made tongue-in-cheek, I mean no offense. I want to tell my story with all the blemishes and flaws so that I can share both triumphs and failures. Hopefully, someone may actually avoid some of the administrative pitfalls that I've experienced. Although I haven't been around as long as many of my IMLA colleagues, I have grown up in the public practice of law. I've been with the City of Boise as an attorney for twenty years, starting first as a prosecuting attorney, then the chief criminal deputy attorney, a senior civil deputy attorney, eventually being appointed in 1995 as the City Attorney. I've watched Boise grow from a small city with a strong rural influence of 107,000, to a vibrant city of 186,000, where the computer business is the primary major industry, growth management is our greatest challenge, unemployment has been lower than the national average for over a decade, and the cost of living has remained relatively moderate. As the City Attorney for a capitol city voted as one of the best places to live for the past several years, serving a Mayor and City Council, has been a challenge. I have had to deal with a wide gamut of legal, ethical, political, and administrative issues. For me, each of these areas requires a great amount of acumen in understanding your clients' needs and wants.

Audit Your Resources

Whether you are setting up a small two-person office or a mid-sized public law firm, you will need to take an inventory. Not of the number of No.2 pencils and legal-sized notepads, but of your workload and your available resources: personnel, equipment, and technology. Some call this process an audit. Others jokingly refer to this as a "consultant's dream."

There are times where you may wish to have an outside audit performed:

> You don't have the time to do it yourself;
> You may have the time, but recognize that J.D. doesn't make you the pundit of office management and efficiency;
> You have the support of your Mayor, City Manager, or City Council, who find your willingness to subject yourself to an audit "refreshing," if not morbidly self-effacing;
> You've taken on this new position without a clue as to where the next administrative grenade is going to go off.

Of course, there are also times where you should not have an outside audit performed:

> Your City's budget is so tight that you wonder if suggesting paying for an audit of your department won't trigger the notion that firing the City Attorney (who's supposed to inherently know how to run or "fix" the Legal Department) will save bucket loads of money;
>
> You've been the City Attorney for 20 years and the City Council is suggesting an audit because you haven't had a fresh, innovative idea since Nixon left office.

The truth be told about "consultants," believe it or not, your clients or constituents may believe a person who has never operated a law office in their city before they believe you.

Meet Your Clients/Customers

Want to make a great first impression? Go the next step further: Meet with your Mayor, City Manager, each Council member, department head, director, and Legal department employee. They all have ideas about how things should be run. But always have a game plan. Allow your ideas to float out for their consideration; test the waters on the need for a reallocation of resources or additional staff. Make sure that you accentuate that these ideas will benefit the listener by resulting in greater access, more timely legal advice, and better or more legal services.

Ask these clients and customers:

> On the whole, describe the timeliness of legal services;
> On the whole, describe the responsiveness to your needs of legal services;
> What two things need improvement in the Legal Department;
> What three things work well in the Legal Department.

Many seasoned executives will tell you to check your ego at the door. I believe that you have to have a strong ego and self-confidence in who you are and what you do. You need, however, to be able to actively listen, keep your mouth in check, and not take candid "input" to heart when the responses are negative or hurtful. Actively listen to what the person says, but also how they say it.

For example, I received a negative comment that Legal was untimely with legal services. When listening to the entire comment, the person indicated that he wanted to call Legal and have an opinion in less than an hour: instantaneous legal opinions supporting whatever that person wants to do.

In conveying this lesson to my staff, I focused on how to manage client and customer expectations. Make sure that you understand the requested service. Proper file management would dictate that you send a confirmatory letter about the request, its receipt, the person handling the matter, and always refer to when they can expect the product: a day, a week, next month. More than once, an attorney has been burned by not documenting a file properly and by regrettably having to deal with an unsatisfied customer.

You need to manage the requests as well. Guidelines for requesting legal services are preferable; but may cause some dissension when one director's priority (I need it now) is not your priority (Mayor needed it yesterday). Review your statutes, charters, and ordinances and know who you serve and who you represent. It is very easy to fall into the quagmire that you're every city employee's personal mouthpiece. Your ability to manage the requests through clear protocols and communication with your department head/ director peers, your Mayor/City Manager/City Council, will assure less conflict and duplicitous effort.

Develop a Strategic Plan.

What would you say is your most significant contribution to your City's organization to date?

What would you like it to be when you leave your position?

Every business has a business plan or strategic plan. Law firms are no different.

As the City Attorney, whether you are operating a two-person office on a shoestring budget or managing a staff of 20 with a multi-million dollar budget, you should commit your Vision and Goals to writing. Without leadership and vision of where you want to take the law office, you are doomed to mediocrity, getting lost in politics or distracted by the small but numerous "fires" needing your attention.

You don't need to hire a consulting team or firm to help devise a Strategic Plan.

Here are some practical pointers:

> Read others' Plans and highlight ideas and philosophies that appeal to you; these will become the foundation for your global/strategic thinking.
> Unabashedly steal good ideas, goals, and objectives.
> Take the information gained from the audit and input from your clients and "customers," and translate the information into some goals and objectives.
> Share your Plan with your client(s).

Share your Plan with your Legal staff.
Review your Plan at least **every** year. A good time to do the review is before your performance review or evaluation. By measuring your accomplishments and challenges, you will be better prepared to offer input to your client(s) regarding performance and/or budgetary issues.
Recognize unrealistic goals, "failures," and plain old "bad ideas."
Revel and relish your law office's accomplishments; share these like they are free!

In your Strategic Plan, you should address:

Your role as City Attorney;
Your department's organization and how it fits into the city's structure;
Performance measures;
A human resources component: Staffing, recruitment, retention, reward & recognition programs;
Technology: A developed plan on how to stay in step with developing technology and the necessary maintenance and training involved in keeping pace;
Facilities.

I've chosen to spend time discussing the HR component and Technology initiatives in my Strategic Plan to further develop some food for thought. You need both good employees and technology in today's law world. Each is a blessing and an evil.

Hire the Best Staff Possible and Keep Them Motivated

Without the proper staffing, your life will feel like you are in the eternal rinse cycle of Life. Without a plan on recruiting and retaining highly qualified employees, you will spend more time interviewing prospective employees and dealing with performance issues. Not that these matters are a waste of time... it's an investment. A good hiring process will reap its own rewards.

Moving away from "open competitive" application processes for qualified attorneys has made a significant difference in recruiting highly motivated and talented attorneys, but also set a more realistic market salary for staff. I am a true believer that you need to actively recruit people to public sector positions. Seek people who fit your organization's needs and who will be committed to your leadership. Always check references and do criminal history checks, but don't rely only upon them.

Here are my TOP TEN TRUISMS TO LIVE AND HIRE BY:

1. **Hire Attitude Rather Than Skill**.
   You can hope to teach specialized skills to entry-level attorneys or support staff; however, attitude transplants usually aren't successful. Qualities to look for: optimism, need for self-achievement, industriousness, and loyalty.

2. **Look for Risk Takers**.
   Risk reaps reward in today's society. Risk drives innovation from the notepad to action. While you should shy away from a wildly uncontrolled risk taker, you should be equally wary about the overly cautious person who can't make decisions.

3. **You Cannot Change People**.
   While you can try to motivate, mentor, move, manipulate, muscle, and mold... Don't disillusion yourself: you can't change the person. What you see is what you get. If you have a probationary employee exhibiting behavior that makes you uneasy or concerned, let them go!

4. **Seek People with a Sense of Humor**.
   If a person cannot laugh, you are in for a rather uneventful, dull relationship.

5. **Diversify Your Personnel Portfolio**
   Seek balance - look at the aggregate value and skills possessed by your present staff and then hire people with those values and skills that are lacking.

6. **Push Harder for Diversity**.
   Recruit high-potential people with different backgrounds, experiences, and skills, since these differences generate creative ideas, allow brainstorming where the environment is safe to voice differing views, and create an atmosphere of constant learning.

7. **Look, Listen, and Live to Avoid Train Wrecks and the Emotional Wreck**.
   Do a background check that will be meaningful. Recognize that most people divulge persons as references that they believe will say glowing things. Find out the name of the secretary to the applicant and make the call. If the driving record of the person before you indicates reckless driving, acceleration of speed, speeding, and driver's suspension - Jump out of the way! People who divulge a lot of detail about personal things either about themselves, their family or their former employer, steer way clear - "TMI" is a cue that the person does not have the sense to know that such comments are inappropriate; or they are in so much

personal turmoil, you end up with an employee who is too distracted or spending an inordinate amount of time on personal calls.

8. **Don't Ignore Your Intuition, Act on It**.
   You should look at reasons NOT to hire... there will always be reasons TO hire. If your "sixth sense" tells you that this person is not a good fit, don't try to talk yourself into hiring the person. Likewise, where you immediately like the applicant, but realize that she/he doesn't possess all of the skills you were searching for, consider taking the risk.

9. **Hire Passion**.
   Nothing is more contagious. Passion motivates and invigorates. Organizationally, a person who is passionate about what he/she is doing, is a person who is committed, willing to learn and enjoys challenges.

10. **Pay People What They are Worth**.
    We may work for government, but when it comes down to it, don't be one to try to guess what a person will accept versus what they are worth to the organization. Lean toward paying worth. A true merit system is good for your office morale and is recognition for what the person contributes.

Recognition and rewards are tantamount to a productive, and yes, "happy" work environment. You need to know your staff well enough to understand what motivates them and keeps them interested in their careers. Non-monetary acknowledgment can have a greater impact upon office morale and personal job satisfaction than monetary bonuses. While some are motivated by money, recognize that others are motivated by less extrinsic favours.

For my office in Boise, historically before 1995, we continually had high turnover in the entry-level positions of my office. Attorneys started as criminal prosecutors, handled a high volume of misdemeanors and infractions, got lots of face time in the courtroom, then left for private firms within a couple of years.

In analyzing what was happening, it was clear:

Misdemeanor criminal litigation was of little challenge past the first 6 trials;
Attorneys yearned for a variety in their workload diet;
We were competing with private firms to retain the best attorneys;
We were the training grounds for private sector.

In my office's first Strategic Plan in 1998, my Vision incorporated the idea of cross-functional teams. By December of 1998, all the assistant city attorneys performed both criminal and civil functions in a team concept. The goals set in cross-functional teams included a component for mentoring as well as promoting individuals' personal and career growth in our organization. Providing greater intellectual challenges and opportunities resulted in better customer service for both our clients and customers.

Our department's employees are given some control in their careers as they are given goals, objectives, and tasks/assignments every year to meet. The measure of their success is evaluated both individually and collectively. It is the responsibility of the City Attorney to provide proper training, support, and guidance of employees.

Likewise, it is the responsibility of the City Attorney to deal with administrative personnel matters within the law office. This is probably one of the most difficult functions of leadership; however, it is critical that personnel matters be addressed, dealt with timely, and not left to languish. So often managers fall victim to the idea that things will get better or smooth out over time. Some things do: like wine, cheese, and wrinkles on a baby's fingers. Poor employees generally never get better if their performance issues are not quickly addressed. My experience as an administrator has led me to the conclusion that there are a number of human "black holes." They can suck the life energy and positive attitude right out of the entire office. Good employees will leave if they feel the poor employee isn't being dealt with. Bottom line: Be thorough in your investigation of complaints or evaluations, be decisive, be expedient, and be fair.

Give Employees the Tools to do the Job

Turning now to a different area, technology is a must in any modern law office. My favorite mantra is "Technology is my friend. It is only in existence to make my life easier." I usually mutter this when my desktop freezes in the middle of the night as I am furiously typing an important document. Whether you have just word processing capabilities or a suite of software that makes your mouth water, you must learn to type; and the faster you can type and synthesize, the faster you may accomplish your tasks. Our attorneys and legal secretaries all take typing tests to have a baseline. Since so much of our business is composing on the desktop, sending and receiving e-mails, and editing documents, keyboarding is a skill that should be mastered.

Before you buy any computer equipment or software, study and seek advice from the "techies." You should know that your choice of software is compatible with your legal community's, the court system's, and your city organization's. You should have an idea of how much memory and speed you need to process at full efficiency. You probably don't need know how to fix a frozen computer (which I really believe is called "reboot"),

or do your own programming, or set up your own database... but it is a plus to hire a secretary or assistant fluent in these areas.

Technology can make the administrative tasks more efficient. IMLA puts all the papers submitted onto a CD disk that you could load in a tower and allow all of your networked attorneys access. Canned performance evaluations are available on disc. Boise is piloting a licensed product where the supervisor completes a customized employee evaluation by clicking a mouse and filling in the blanks. You can produce a CD business card, complete with logo, sound, information, and pictures to hand out to prospective customers. Budgets and salary spreadsheets are made easier with the advent of databases developed for people like me who are mathematically challenged... percentages and numbers make me woozy!

Reviewing your laws and city policies on public records will help you to know how to best protect your client's confidential or privileged information on the computer. You should know how to take affirmative steps to dispel expectations of privacy by employees conducting business (or pleasure) on your city equipment on your client's behalf.

Which leads back to good employees and good technology being both a blessing and a curse!

Sit Back and Enjoy the Ride

Just because you are an attorney, don't think you can't be sued for making administrative decisions. Being familiar with employment law is a plus; however, communicating your values, goals, and vision will help others understand some management discretionary decisions. Why is it some managers can make the right decision and have a divisive work environment and others can be completely wet on the decision yet never experience a disgruntled employee?

Also recognize that sometimes, it just doesn't matter how well you prepare your staff, share information, and implement policies... someone may not be completely satisfied. And working for you, learning the law, gives one a sense that "litigate" and "remediate" are synonymous. While standing firm and making managerial decisions based upon sound reasoning should carry the day... always be willing to listen to what your detractors are saying. Be flexible and accommodating where appropriate and keep the big picture in mind.

The most difficult personnel matters can make the most competent of city attorneys wish they were back prosecuting dog cases in municipal court. It happens to all of us. Keep the bigger picture in sight, concentrate on your Vision and Goals, remain true to your ethics and professionalism, and you will more fully enjoy your career as a city attorney. The benefit of being a member of IMLA is that you have a wealth of information available, both on-line and offered at these conferences. The networking opportunities here with our country's finest municipal lawyers are unsurpassed.